SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 57.

OLD WAYNE MUTUAL LIFE ASSOCIATION OF INDIANAPOLIS, INDIANA, PLAINTIFF IN ERROR,

vs.

SARAH McDONOUGH AND JOHN HERRITY, ADMINISTRATOR OF THE ESTATE OF WINNIFRED HERRITY, DECEASED.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

In this case the court is asked to review a judgment of the Supreme Court of Indiana affirming a judgment against the appellant of the Marion county superior court of that State. The suit in Indiana was upon a judgment obtained against the appellant in a State court in Pennsylvania.

This court having repeatedly held that a State has the right to prescribe the terms upon which a foreign corporation may do business therein, subject to certain exceptions, the question raised by this writ of error is whether the present case comes within the principle of such exceptions.

The act of the Pennsylvania legislature, the validity of which is one of the questions before the court, is section 1

of an act passed in 1883 (Rec., p. 32), and is in the following words:

"*Be it enacted, &c.,* That section thirteen of said act which reads as follows: namely, 'No insurance company, not of this State, nor its agents, shall do business in this State until he has filed with the insurance commissioner of this State, a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the insurance commissioner, or the party designated by him, or the agent specified by the company to receive service of process for said company, shall have the same effect as if served personally on the company within this State, and if such company should cease to maintain such agent in this State, so designated, such process may thereafter be served on the insurance commissioner; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with service at the office of said company within this State, and that such service of process according to this stipulation, shall be sufficient service on the company. The term process includes any writ of summons, subpœna, or order, whereby any suit or proceeding shall be commenced, or which shall be issued in or upon any action, suit or proceedings in any court of this Commonwealth having jurisdiction of the subject-matter,' be and the same is hereby amended as follows: 'No insurance company not of this State, nor its agents, shall do business in this State until he has filed with the insurance commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the insurance commissioner, or the party designated by him, or the agent specified by the company to receive service of process for said company, shall have the same effect as if served personally on the company within this State, and if such company should cease to maintain such agent in this State so designated, such process may thereafter be served on the insurance commissioner; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of the said company within this

State, and that such service of process according to this stipulation shall be sufficient personal service on the company. The term process shall be construed to mean and include any and every writ, rule, order, notice, or decree, including any process of execution that may issue in or upon any action, suit or legal proceeding to which said company may be a party by themselves, or jointly with others, whether the same shall arise upon a policy of insurance or otherwise, by or in any other court of this Commonwealth having jurisdiction of the subject-matter in controversy, and all writs, rules, orders, notices, or decrees aforesaid, shall be directed to the sheriff, constable, or other officer authorized by law to serve similar writs, of the county wherein the same shall be issued, who is hereby authorized to serve the same on any and every person or persons, body politic or corporate, named in said process with said company, either as plaintiff, defendant or otherwise, or who may be impleaded in said action, suit or proceeding with said company found in said county, and either before or after the service on the person or persons, body politic or corporate found in said county aforesaid as may be directed by the plaintiff or person issuing said process, or his attorney; and in the absence of such direction, as shall be most convenient, the officer to whom said process may be directed, shall, by writing endorsed on, or attached to said process deputize the sheriff, constable, or any officer of the county where the State agent designated by any company as provided by law to receive service of process for said company, may reside to serve the same on him; and in default of an agent appointed by the company as aforesaid, then the officer so charged with the service of said process, shall in like manner deputize the sheriff, constable, or other officer aforesaid of the county, where the agent, if any there be, named by the insurance commissioner, may reside, to serve the same on him; and in default of such agent named by such insurance commissioner as aforesaid, then in like manner to deputize the sheriff, constable or other officer as aforesaid of the county where the office of the insurance commissioner may be located to serve the same on him; and each and every service so made shall have the same force and effect, to all intents and purposes, as personal service on said company in the county where said process issued; and the fees of the officers serving said process, shall be the same as are allowed by law for services in similar cases with the mileage allowed by law in

such cases, the distance to be computed from the residence of the officer serving or executing the same and no further and all necessary postage paid by either of said officers shall be charged for as costs in the case' " (Rec., pp. 32, 33).

This act being in force, an action was brought by the defendants in error against the plaintiff in error (a corporation organized under the laws of Indiana), in the court of common pleas of Susquehanna county, Pennsylvania. The original summons was issued July 5, 1900 (15). On the same day there was filed in that court "Copy of plaintiffs' statement" (17). This summons was returned by the sheriff *nihil habet* (17).

On the "24th day of September, 190–," an *alias* summons was issued (22).

The *alias* writ was returned by the sheriff served on the appellant by giving a copy on September 26, 1900, "to Israel W. Durham, insurance commissioner for the State of Pennsylvania, and making known to him the contents thereof, the said association having no attorney in the State of Pennsylvania upon whom service could be made" (22).

In February, 1900, the declaration in the case was filed. From the backing of the declaration, as found on page 27 of the record, it would appear that this declaration was filed February 22, 1900. This is an obvious mistake, as the original summons was not issued until the following August. On page 28 is a copy of a notice to the insurance commissioner that the declaration had been filed. This notice is dated February 23, 1901. The sheriff's return shows that a copy of the declaration was served on the insurance commissioner on February 27, 1901.

In the plaintiffs' statement, which was filed when the original summons was issued (17), it was set forth that the claim upon which the suit was brought was upon a policy of insurance dated the 3d day of December, 1897, No. 01159, which was "executed and delivered by the defendant to the plaintiffs on the said 3d day of December, A. D. 1897, at

Scranton, Pennsylvania." But when the declaration proper was filed it appeared by a copy of the policy sued on, which was annexed to the declaration, that by its terms no recovery could be had for any claim under the policy after a lapse of six months from the death of the member whose life was insured (26). As the declaration set forth that the insured died in November, 1898 (26), it is obvious that the suit was barred if this provision was enforceable. But at the foot of the copy of the contract which was annexed to the plaintiffs' statement (21) was this note:

"The above contract of insurance is governed by the laws of the State of Indiana, the contract having been entered into at Indianapolis, Indiana.

"MILLER S. ALLEN,
"Attorney for Plaintiffs."

The declaration subsequently filed contained this paragraph (26):

"That said policy of insurance and the contract touching the issuing of the same were executed in the State of Indiana, in which State all provisions limiting liability on policies where suit is not brought in a certain time are held void and of no account."

A judgment by default having been entered against the company in the Pennsylvania court on the 16th day of April, 1901 (29), suit was brought on the judgment so obtained against the company, in Indiana, in June, 1901 (1).

By its pleas in the Indiana suit, the defendant, after denying the material allegations of the complaint, alleged by way of further defense that the company was an Indiana corporation; that it had never at any time been admitted to business in Pennsylvania or had any officer or agent in that State for the transaction of business; that no officer or agent of the company was in Pennsylvania at the time of the commencement of the suit there, or at any time thereafter; that no summons was served on the defendant at any time or place, and that the first notice or knowledge or information which

the company ever had of the recovery of the judgment sued on was long after the time it was claimed by plaintiffs the judgment had been recovered (6).

The plaintiffs in the suit by their replication denied all the material averments of the answer (7). At the trial, when the record in the Pennsylvania case was offered in evidence on behalf of the plaintiffs, it was objected to on the ground, among others, that the Pennsylvania statute under which process was served upon the insurance commissioner of that State was invalid because it deprived the defendant of its property without due process of law, contrary to the first clause of the fourteenth amendment to the Constitution of the United States (13).

The court overruled the objection and admitted the transcript in evidence; to which ruling of the court the defendant, by counsel, at the time duly excepted (15).

Later in the trial the same point was again ruled upon in the same manner by the trial court on a motion to strike out the Pennsylvania statute (33), and again on a motion to strike out the transcript (34, 36).

There was no further evidence in the case and judgment was entered in favor of the plaintiff. Subsequently, on motion to set aside the judgment and grant a new trial, the same ruling was again made by the trial court (9).

An appeal having been taken to the Supreme Court of Indiana from the judgment so rendered, the judgment was there affirmed (45).

In the opinion of the latter court (40-45) it was held that the Pennsylvania statute in question was not unconstitutional under that clause of the fourteenth amendment to the Constitution of the United States which prohibits the States from depriving persons of property without due process of law.

To review the judgment of the Supreme Court of Indiana a writ of error was allowed by Mr. Justice Day (47).

Assignment of Errors.

The court below erred:

1. In affirming the judgment of the Marion county superior court.

2. In not reversing the judgment of the Marion county superior court, because there was no evidence in the case tending to show that the plaintiff in error was engaged in business in the State of Pennsylvania at the time of the service of the *alias* writ upon the insurance commissioner of that State.

3. In holding that the Pennsylvania statute set forth on pages 2 and 3 of this brief is a valid and constitutional law.

ARGUMENT.

I.

The Pennsylvania judgment is invalid, outside of that State at least, because it does not appear that when process was served on the insurance commissioner the plaintiff in error was doing business in Pennsylvania.

It has several times been held by this court that a judgment in a State court against a foreign corporation cannot be enforced in another State if when the suit was begun and carried on the defendant corporation was not engaged in business in the State. Thus, in Barrow Steamship Co. *v.* Kane, 170 U. S., 111, it was held, "upon the fundamental principle that no one shall be condemned unheard," that the jurisdiction of a State court is not supported in a federal court when the foreign corporation does no business and has

no agent in the State, although in the State courts under State statute service on any officer or employee is held valid.

And in St. Clair *v.* Cox, 106 U. S., 350, involving the statute of the State of Michigan, providing that service of process upon a foreign corporation engaged in business in the State might be upon any officer, clerk, member, or agent of such corporation, a judgment after service on an agent of the defendant was held void in other jurisdictions because it did not appear that the company was engaged in business in the State.

In Fitzgerald Co. *v.* Fitzgerald, 137 U. S., 98, 106, it was held that when a foreign corporation was not doing business in a State, service on its president was unavailing, whether (as claimed by the corporation) or not he was inveigled into the State for the purpose of having process served on him.

In Mutual Life Ins. Co. *v.* Spratley, 172 U. S., 602, it is said that in a suit where no property of a foreign corporation is within the State and the judgment sought is a personal one, it is a material inquiry whether the foreign corporation is engaged in doing business in the State, citing Goldey *v.* Morning News, 156 U. S., 519; Merchants' Mfg. Co. *v.* Grand Trunk R. Co., 13 Fed. Rep., 358. And in Spratley's case it was further held that service must be on some agent so far representing the corporation in the State that he may properly be held in law an agent to receive such process on behalf of the corporation. It was further held that service on an agent sent into the State to compromise the claim which was the subject of the suit was good.

Return of service upon an officer of a foreign corporation is insufficient unless it appears from the return or from the record that the company is doing business in the State when the suit is begun (Central Grain & Stock Ex. *v.* Board of Trade, 125 Fed., 467).

In the suit brought in Indiana on the Pennsylvania judgment it was averred in the complaint that the defendant "is now and was on the 3d day of December, 1897, and long prior and subsequent thereto, engaged in the transaction of its said business in the State of Pennsylvania, soliciting applications for insurance from and issuing policies to residents of said State" (2). This is one of the material allegations denied by paragraph 1 of the answer in the case (6). No evidence was offered to support this averment, and it would seem that on this account alone the judgment below should be reversed.

But it will probably be claimed here that sufficient evidence on this subject is to be found in the transcript of the judgment in the Pennsylvania suit. The plaintiff's statement of claim in the Pennsylvania court, which was filed when the original summons was issued, did indeed set forth that the policy sued on was executed and delivered at Scranton, Pennsylvania (17). But this averment does not help the defendants in error for two reasons: In the first place, this court has decided that a single transaction does not constitute doing business in the State (Allgeyer *v.* Louisiana, 165 U. S., 578; Cooper Manufacturing Co. *v.* Ferguson, 113 U. S., 727). There are several other cases in the State and federal courts to the same effect (Ammons *v.* Brunswick-Balk-Collender Co., 141 Fed. Rep., 570, decided by the Circuit Court of Appeals for the Eighth Circuit; State *v.* Robb, 106 N. W. Rep., 406, in the Supreme Court of North Dakota; Jameson *v.* Simonds Law Co., 84 Pac. Rep., 269, in the Court of Appeals, First District of California).

In the next place, when they filed their declaration in the Pennsylvania suit the plaintiffs in that action carefully set out that the policy of insurance was issued in Indiana. This averment is shown to have been necessary to enable the suit to be maintained, the counsel who brought the suit evidently recognizing the fact that if the policy was a Pennsylvania contract it was barred by the provisions of the policy, which

required suit to be brought within six months after the death of the insured (36).

It was further averred in the Pennsylvania declaration that the company had been doing the business of life insurance in Pennsylvania, and particularly in the counties of Susquehanna and Lackawanna, and was transacting the business of life insurance in that State and in the counties above mentioned at the date of the policy sued on and before and afterwards until July 5th, 1900 (27). But this declaration was not filed until February, 1901 (28). This was about five months after the service of process made on the insurance commissioner of Pennsylvania (22). Besides, the service of a copy of the declaration on the insurance commissioner could have no effect whatever, because it is not authorized by the Pennsylvania statute in question. That act (32) attempts to authorize in certain cases service of process upon the insurance commissioner, and further provides (32) that "the term process shall be construed to mean and include any and every writ, rule, order, notice, or decree, including any process of execution that may issue in or upon any action, suit, or legal proceeding to which said company may be a party by themselves, or jointly with others, whether the same shall arise upon a policy of insurance or otherwise, by or in any other court of this Commonwealth having jurisdiction of the subject-matter in controversy, and all writs, rules, orders, notices, or decrees aforesaid, shall be directed to the sheriff, constable, or other officer authorized by law to serve similar writs, of the county wherein the same shall be issued."

Clearly the declaration in a suit does not come within this description. The notice of the filing of the declaration in this case is not addressed to the sheriff, but to the insurance commissioner himself (28). The statute evidently refers to process emanating from the court and not from counsel.

It is therefore respectfully submitted that, there being no evidence of any kind in the case that the plaintiff in error

was engaged in business in Pennsylvania at any time between the date of the policy in suit and the date of the Pennsylvania judgment, the service upon the insurance commissioner must be held to have been of no effect outside, at least, of the courts of Pennsylvania.

II.

The Pennsylvania judgment is invalid because the statute under which process was served on the insurance commissioner does not provide for any notice to the foreign corporation.

There are certain general principles bearing upon the questions involved in this writ of error that have been too often settled by this court to admit of discussion now or require careful examination of the authorities. A State may, of course, exclude altogether a foreign corporation, or may, in general, allow it to do business within its territory upon such terms as it deems proper (Bank of Augusta *v.* Earle, 13 Pet., 519; Paul *v.* Virginia, 8 Wall., 168; R. R. Co. *v.* Harris, 12 Wall., 65; *Ex parte* Schollenberger, 96 U. S., 369).

On the other hand, a judgment rendered in a State court, without personal service on the defendant, may be a good judgment, even *in personam,* against such defendant in that State, but void everywhere else (Goldey *v.* Morning News, 156 U. S., 518; Barrow Steamship Co. *v.* Kane, 170 U. S., 111; Grover *v.* Radcliffe, 137 U. S., 287; La Fayette Ins. Co. *v.* French, 18 How., 406).

Due process of law requires notice and an opportunity to be heard (Lasere *v.* Rochereau, 17 Wall., 437; Orchard *v.* Alexander, 157 U. S., 372, 383; McVeigh *v.* U. S., 11 Wall., 259).

And upon the very point of the right of a State to determine the conditions upon which it will permit foreign corporations to carry on their business within its borders this court

has repeatedly held that such right may be affected by the Constitution of the United States. The power of the State in this regard is subject to "such limitations on her sovereignty as may be found in the fundamental law of the Union" (Ducat *v.* Chicago, 10 Wall., 410, 415).

In La Fayette Insurance Company *v.* French, 18 How., 406, 407, it is said:

"Whenever an action is brought in one State on a judgment recovered in another, it is not enough to show it to be valid in the State where it was rendered; it must also appear that the defendant was either personally within the jurisdiction of the State, or had legal notice of the suit, and was in some way subject to its laws, so as to be bound to appear and contest the suit, or suffer a judgment by default. In more general terms, the doctrine of this court, as well as of the courts of many of the States, is, that this act of Congress was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result; nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another."

* * * * * * *

"The inquiry is not whether the defendant was personally within the State, but whether he, or some one authorized to act for him, in reference to the suit, had notice and appeared; or, if he did not appear, whether he was bound to appear, or suffer a judgment by default. And the true question in this case is, whether this corporation had such notice of the suit, and was so far subject to the jurisdiction and laws of Ohio, that it was bound to appear, or take the consequences of non-appearance.

"A corporation created by Indiana can transact business in Ohio, only with the consent, express or implied, of the latter State (13 Pet., 519). This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

A corporation lawfully doing business in a State is no more bound by a general unconstitutional statute than a citizen of the State (Cargill Co. *v.* Minnesota, 180 U. S., 452; Carroll *v.* Greenwich Ins. Co., 199 U. S., 409).

While this court holds that a foreign corporation must comply with State laws, it is not to be understood to intimate that State laws invalid, as contrary to the Constitution of the United States, can be imposed as a condition upon the right of such a corporation to do business within the State (Dayton Coal & Iron Co. *v.* Barton, 183 U. S., 23).

The right of a State to allow foreign corporations to do business in the State on such terms as it pleases is "subject always of course to the paramount authority of the Constitution of the United States" (Hooper *v.* California, 155 U. S., 648, 656).

In the leading case of Insurance Company *v.* Morse, 20 Wall., 445, 451, 455, in which it was held that a contract made by an insurance company, as a condition of doing business in the State of Wisconsin, that it would not remove suits brought against it to the Federal courts was void, Mr. Justice Hunt, delivering the opinion of the court, said:

"A man may not barter away his life or his freedom, or his substantial rights. * * * He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." * * *

"We are not able to distinguish this agreement and this requisition, in principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation."

The doctrine laid down in the last-mentioned case was affirmed in Doyle *v.* Continental Ins. Co., 94 U. S., 535; Southern Pacific R. Co. *v.* Denton, 146 U. S., 202, and in Barron *v.* Burnside, 121 U. S., 186. In the latter case an

Iowa statute was under consideration which required every foreign corporation, as a condition of obtaining permission to transact business in Iowa, to stipulate that it would not remove suits against it into the Federal courts, and made it a penal offense for any agent, officer, or employee of such corporation to transact the business of the corporation in the State when no stipulation had been filed. Barron, the plaintiff in error, was an engineer engaged in Iowa in running a locomotive belonging to a foreign railroad company. Having been arrested for a violation of the act, he sued out a writ of *habeas corpus* in the State court, and the supreme court of the State having remanded him to the custody of the sheriff, he obtained a writ of error from this court. In delivering the opinion of the court, Mr. Justice Blatchford, after referring to the fact that the railroad corporation in question had not filed the stipulation required by the Iowa statute, but had refused to do so, said:

"Its [the railroad company's] right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove such suits. As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

Surely the right to have notice and an opportunity to be heard before judgment is more important even than the right of a non-resident of a State to remove a suit against him from the State courts to the Federal courts. The latter right involves the question of a hearing in one court or another; the former the question whether the party shall be heard at all. Even if the right to remove a case from the State to the Federal courts could be waived, as this court has held it cannot,

the constitutional rights of the party would be preserved, because if the State court of last resort should undertake to deprive the party of any such right, a remedy would lie by writ of error from this court. But if a party be deprived altogether of an opportunity to be heard, then his rights under the Constitution are sacrificed, as well as every other right that he might have insisted upon if given an opportunity.

The fundamental objection to the Pennsylvania statute under consideration is that it does not directly or indirectly require, or even authorize, the insurance commissioner to notify foreign corporations of the service of process upon him. In a number of States acts of this kind have been passed, but they usually provide that the State officer upon whom process is served shall at once transmit to the corporation sued the papers served upon him or a copy thereof. Such a statute was sustained by this court in Mutual Reserve, &c., Ass'n *v.* Phelps, 190 U. S., 147. The Kentucky statute involved in that case, as quoted by the court on page 148, contained the following provision:

"And if process is served upon the commissioner it shall be his duty at once to send it by mail addressed to the company at its principal office."

The Kentucky statute here referred to was considered by District Judge Evans, holding the Circuit Court for the District of Kentucky, in Swan *v.* Mutual Reserve, &c., Ass'n, 100 Fed. Rep., 922. The service on the commissioner of insurance of the State of Kentucky under the statute was held to be void in that case, because at the time the service was made the company had been excluded from the State and was then not doing business therein.

It would seem that there can be no doubt that a State statute requiring a foreign corporation, as a condition of doing business in the State, to agree that suits against it might be prosecuted within the State, without service of process upon anybody or without notice of any kind, would be absolutely void. It is difficult to see any difference in effect between

such a statute and one which undertakes to authorize service of process by leaving a copy of the summons in the office of some State official without any duty on his part to attempt to communicate with the corporation at all the fact that a summons has been served upon him. The very fact of the omission from such a statute of any direction for the forwarding of the papers served or any information in regard thereto, to the defendant implies that no duty of communicating with the defendant is imposed upon the official. For all practical purposes, the law might as well provide that the sheriff shall take the summons and throw it into the river. In Ins. Co. *v.* Morse, 20 Wall., 445, and the other more recent cases affirming that case, it was held that foreign corporations were not barred from removing suits to the Federal courts notwithstanding the fact that they had filed with the State a stipulation agreeing not to do so. In the present case it is not averred, either in the suit in Pennsylvania or in the suit in Indiana, that any such stipulation had been filed. It cannot, therefore, be claimed that the plaintiff in error in this case has agreed that service of process upon the insurance commissioner of Pennsylvania might be considered service of process upon it. If it had done so, it might in a measure have protected itself by watching the office of the insurance commissioner to see from time to time during an indefinite number of years what papers had been filed in his office affecting its interests. The company would then be in the position of a taxpayer, whose rights were considered in Kuntz *v.* Sumption, 117 Ind., 1, in which the Supreme Court of Indiana said:

"We must hold that such a taxpayer is entitled to notice, or else we must hold that he is bound, at his peril, to keep vigilant watch of the proceedings (of the county board of equalization) lest property he does not own be assessed to him, or the valuation of his listed property be increased. In the absence of notice to him as an individual, he is not bound to exercise any such vigilance.

"It would be almost as unjust to compel such a taxpayer

to be constantly on the watch during the meeting of the board, as to compel a defendant who has failed to pay a note, violated a covenant, or committed a trespass (or issued an insurance policy) to watch the dockets of the court during term time."

The precise question involved here was decided by the Supreme Court of Wisconsin in Pinney *v.* Providence Loan and Investment Co., 106 Wis., 402, 403. The State statute in that case required a domestic corporation to file in a certain office a list of its officers upon whom process might be served, and further provided that if any such corporation should fail to file such list, service might be made by delivering copies of the summons and complaint to the register of deeds of the county in which the suit was brought.

The court said:

"While foreign corporations may be permitted to do business within the State upon certain conditions, or be excluded altogether, and while domestic corporations may be subject to reasonable regulations and control, yet neither can be deprived of its property without due process of law. Undoubtedly, the legislature may, as it has in certain cases, authorize constructive service of summons to be made upon corporations, as well as individuals, especially where the action concerns property located within the State; but the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity for being heard and making a defense before the determination. Such service was not secured 'by delivering to and leaving with the register of deeds * * * true copies of the summons and complaint as prescribed by the portion of the statute quoted. On the contrary, such service, if held to be effectual, would be well calculated to conceal from the officers and agents of the corporation the fact that such an action had been commenced. True, the register is a public officer, with duties prescribed by statute; but he is in no sense the agent or representative of 'private corporations, incorporated or organized under any law of this State.' Such corporations are supposed to be clothed with authority to select and appoint their own officers

and agents. We must hold the clause of the statute in question to be unconstitutional and void."

In Rothrock *v.* Dwelling House Ins. Co., 161 Mass., 425, suit had been brought in Massachusetts on a judgment obtained against a Massachusetts corporation in Arkansas. A statute of that State prohibited foreign corporations from doing business in Arkansas until they had filed a stipulation that service of process in actions against them might be made on the auditor of the State. The Dwelling House Insurance Co. had agents in Arkansas soliciting insurance, but did not file any such stipulation. The judgment in Arkansas was obtained after service of process had been made on the State auditor in accordance with the act. There was no provision in the law requiring the auditor to forward the papers served on him to the corporations, or give them notice in any other way, and in fact no such notice was given. The Supreme Judicial Court of Massachusetts, referring to the fact that under a similar state of facts a Federal court had held another insurance company to be estopped to deny the jurisdiction of the Arkansas court (Sherman *v.* Teutonia Insurance Co., 1 Fed. Rep., 471; 1 McCreary, 128), refused to follow that decision and held that the judgment was void.

In connection with these cases should be considered the case of Carroll *v.* N. Y., N. H. & H. R. Co., 46 Atl. Rep., 708, decided by the Supreme Court of New Jersey. In that case the statute provided that foreign corporations doing business in New Jersey might be served with process by service upon any officer, clerk, or engineer of the corporation. Service on an engineer of a boat belonging to the defendant company was held void, notwithstanding the statute, on the ground that the engineer had no such connection with the business out of which the cause of action arose as might fairly give rise to the inference that he had authority to represent the corporation in that matter.

In Wilson *v.* Seligman, 144 U. S., page 45, this court on this general question refers to two decisions in England

(Valleé *v.* Dumurgue, 4 Exch., 290; and Copin *v.* Adamson, 9 L. R. Exch., 345, affirmed on appeal, 1 Exch. Div., 17).

In Valleé *v.* Dumurgue the defendant was a shareholder in a French corporation and was sued in England upon a judgment obtained against him in France. In compliance with the French law, he had agreed in writing that process might be served on him by leaving it at a certain banking establishment in Paris, and the judgment in France had been obtained against him at the domicile of the corporation in which he was a shareholder and by service of process upon his agent in accordance with his agreement. That this case has no application to the one at bar would seem to be obvious.

Copin *v.* Adamson was another case of a suit in England upon a judgment obtained in France against a shareholder in a French corporation. In the suit in England the defendant filed a plea setting up as a defense that the judgment in France had been obtained against him without service of process or without notice of any kind. To this plea two replications were filed. The first replication set out that by the law of France *and the articles of association* of the corporation in which the defendant was a shareholder service of process upon a shareholder might be made at his elected domicile in Paris, and in default of such election might be made at a certain public office. The second replication was like the first, except that it referred only to the French law, omitting any reference to the articles of association.

On demurrer to these replications the first one was sustained on the ground that it showed that the defendant had agreed that service of process might be made upon him by leaving it at the public office referred to. Two of the three judges held that the second replication was bad, holding that the law of France alone could not make service of process upon a Government official a good service against a nonresident.

On appeal the judgment of the lower court was affirmed as to the first replication, and no decision was given as to the second replication.

So far as these English cases go, therefore, they hold that service upon a non-resident by leaving the summons at a public office is a good service when he has agreed to accept such service, but is of no validity when the law declares that it shall be a good service, but he has not given his assent to that provision.

It is respectfully submitted that the judgment of the Supreme Court of Indiana should be reversed.

A. S. WORTHINGTON,
Attorney for Plaintiff in Error.